

ARTICLES

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Regional Land Use Planning: A Collaborative Solution for the Conservation of Natural Resources

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INTRODUCTION

Government plays a large role in the preservation of the nation's natural resources, including state and national parks. As such, state and federal governments have set in place regional land use schemes that seek to preserve these large parklands that often span local boundaries. However, traditionally, land use regulation is a function left to local governments pursuant to their police powers.¹ In furtherance of this local power to regulate the use of land, the Property Clause of the U.S. Constitution makes clear that the federal government has the ability to regulate federal lands, but makes no mention of its ability to control non-federal lands.² On a lower level, many states have explicitly granted local governments the authority to regulate the use of their land.³ In contrast to these principles, governments often preempt local land use regulations when seeking

¹ See, e.g., *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 387 (1926).

² U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

³ See N.Y. TOWN LAW § 264 (McKinney 2013); N.Y. GEN. CITY LAW § 19 (McKinney 2013); N.Y. VILLAGE LAW § 7-700 (McKinney 2013).

to preserve natural resources that exist within a region or to promote the interests of the state.⁴

Regional land use schemes are set in place when the government has an interest in the resource to be preserved.⁵ Within the United States, the federal government has a history of conserving the country's natural resources for ecological and recreational reasons. The development of the national parks system was deemed a federal priority evidenced by the creation and expansion of the National Park Service (NPS).⁶ President Woodrow Wilson created the NPS in 1916 to "promote and regulate the use of the Federal areas . . . to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."⁷ Similarly, states have taken an interest in the preservation of state parks and therefore have prevented local land use regulation.⁸

Often times, conflict is created when land use regulation is taken out of the hands of local governments. The classic debate can be framed by the concepts of localism and regionalism: whether it is

⁴ See John R. Nolon, *The Erosion of Home Rule Through the Emergence of State Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 500 (1993). See also Power NY Act of 2011, 2011 N.Y. Sess. Laws 388 (McKinney) (preempts local government land use control for the siting of energy facilities over 25 MW, which will include more wind and solar renewable energy facilities).

⁵ Other examples of federal preemption and involvement in local land use include the First Amendment's prohibition of municipalities from completely excluding adult businesses, see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981), the Telecommunications Act of 1996 preemption of local control over cellular communication towers, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), the Energy Policy Act of 2005 preemption of local control over liquid natural gas terminals, Energy Policy Act of 2005, Pub. L. No. 109-58, § 311, 119 Stat. 594 (2005), the Coastal Zone Management Act and the Disaster Mitigation Act of 2000 both requiring states and local governments to properly plan (however they do not specifically prescribe land use requirements that must be enacted), Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972).

⁶ 16 U.S.C. § 1a-1 (2012) ("Congress declares that the [parks within the] national park system . . . though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage; that, individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States.").

⁷ 16 U.S.C. § 1 (2012).

⁸ See Nolon, *supra* note 4.

good policy for local governments to govern the use of their land or whether governance should be in the hands of a regional agency. This question depends on several factors, including the policy being implemented and its goals. While each theory—localism and regionalism—has its advantages, each may also impede policy goals from being achieved. In the context of natural resource conservation, specifically the conservation of parklands, this Article suggests that regional governance is the most advantageous because local government policies may not align with the conservation goals of the region for various reasons. However, regional policy decisions must incorporate collaborative processes that include all affected stakeholders within the region. Not only will this process preserve natural resources, but it will also safeguard the notions of localism that are so vital to strong communities.

This Article will analyze the methods of government regulation of private land uses within national and state parks, identifying both the various advantages and weaknesses. Specifically, this Article will analyze the Fire Island National Seashore and the Adirondack State Park's regional land use schemes, where the federal government and New York, respectively, have faced difficulties conserving a park that has both local government and privately-owned land within its boundaries. The Article discusses, in detail, the forms of collaborative decision making that can apply to a regional land use agency, including forms of participatory planning and negotiated rulemaking. The analysis will provide a best practices model for making regional land use decisions in these unique situations that includes installing a collaborative method of decision making. Making decisions through collaborative means increases transparency, accountability, and regulatory conformance by building consensus-based decisions. The Article will follow two ongoing regional processes designed to preserve parkland and highlight how collaborative processes are a pragmatic solution to the local and regional divide.

I

FEDERALISM, LAND USE, AND THE ENVIRONMENT

When formulating environmental policy, it is important to understand the politics at play. Environmental policy is often controversial because environmental impacts transcend governmental boundaries. Thus, it is not out of the ordinary for more than one governmental entity to be involved in formulating environmental policies. Furthermore, each governmental stakeholder will possess

different priorities and mold its policies accordingly. Within environmental law, “cooperative federalism” is used to describe the relationship between the federal government and the states or their counterparts, local governments.⁹ More specifically, and for the purposes of this Article, it is important to outline the major stakeholders in a regional land use system, which includes local governments, residents, and the regional entities. Through an examination of the concepts involved in a cooperative scheme, localism, and regionalism, governments will be able to apply certain best practices when forming regional land use authorities to promote their interests.

A. Localism vs. Regionalism

Many scholars have discussed the concepts of localism and regionalism in the context of metropolitan areas, noting the advantages and disadvantages of both.¹⁰ This Article takes the debate outside of the metropolitan areas and applies the same principles to the conservation of natural resources. On a theoretical level, the conflict between local governments and regional land use entities represents the diverging interests of localism and regionalism. Regionalism is vital to the proper natural resource conservation that lends itself to multijurisdictional enforcement problems. It provides a framework for uniform land use regulations across the park. However, this is not to say that local land use control is not without advantages. In fact, localism creates a sense of community and allows residents to address concerns through an enhanced, although arguably flawed, democratic process. This Section will explore the concepts of localism and regionalism and how they apply in the context of natural resource conservation. In addition, this Section will address the obstacles inherent in local politics that impede regional entities from achieving their goals.

Professor Richard Briffault describes localism as “the view that the existing system of a large number of relatively small governments wielding power over such critical matters as local land use regulation, local taxation, and the financing of local public services ought to be

⁹ See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 183 (2005).

¹⁰ See Matthew J. Parlow, *Equitable Fiscal Regionalism*, 85 TEMP. L. REV. 49 (2012); Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000).

preserved.”¹¹ Conversely, he describes regionalism as a shift of power from local governments to a regional authority, restricting local autonomy and decreasing the ability of local governments to address local concerns.¹² Regionalism suggests that the identified region is connected by economic, social, or ecological interests that ignore local boundaries.¹³ For example, and most helpful for the purposes of this Article, an ecological region may be identified by common natural resources such air, land, or water.¹⁴

It is important to note that the advantages of localism should be preserved and incorporated while achieving regional goals. Without incorporation of these benefits, a regional land use system will not be sustainable. The benefits of localism include the efficient allocation of public services, increased democratic processes, and the creation of a strong community. First, local governments are best suited to provide local services to their residents as well as address concerns that residents express.¹⁵ Local governments must be accountable to their residents because if not, according to the Tiebout model, residents will become frustrated and vacate for a more sympathetic locality.¹⁶

Second, it is argued that localism has the ability to increase the democratic process and, as such, increase meaningful public participation.¹⁷ On the local level, there are more opportunities for residents to directly speak to their government because, in theory, local officials are more accessible than officials in other levels of government.¹⁸ It is also argued that participation is more effective and influential at the local level, due in part to the size of local governments.¹⁹ For example, the state and federal governments are

¹¹ Briffault, *supra* note 10, at 1.

¹² *Id.*

¹³ *See id.* at 3.

¹⁴ *See id.*; *see also* Keith H. Hirokawa, *Three Stories About Nature: Property, the Environment, and Ecosystem Services*, 62 MERCER L. REV. 541, 593 (2011) (“[T]he Ecosystem Services approach recognizes that the value added of ecological goods and services may derive from services performed off-site and likewise recognizes that the functionality of ecosystems on-site will impact the value of goods and services benefitting other properties. As such, the Ecosystem Services manner of attributing value to ecosystem functionality serves as an articulation of the idea that property interests may accrue inside another’s property boundaries.”).

¹⁵ *See* Charles M. Tiebout, “A Pure Theory of Local Expenditures,” 64 J. POL. ECON. 416, 416–17 (1956).

¹⁶ *See id.* at 421–22; *see also* Parlow, *supra* note 10, at 55.

¹⁷ *See* Briffault, *supra* note 10, at 16.

¹⁸ *See id.* at 16–17.

¹⁹ *See id.*

large entities with many public policy forums, and therefore local residents are intimidated to participate in the formation of policy.²⁰ However, this notion is fading due to the ineffectiveness of the traditional forms of public participation as is highlighted in the case studies throughout this Article. This Article will suggest that local and regional conflicts are not born from inherently different forms of governance, but from a lack of communication that occurs as a result of traditional public participation models.²¹ Local governments do not feel disadvantaged by the regional land use process when communication principles, representing best practices, are incorporated in the formation of a regional authority.

Lastly, localism suggests that local governments are a community of connected individuals with common interests.²² This sense of identity is strong in many communities and can be the cause of contention with regional authorities.²³ In turn, local governments may respond through protest and defiance, which is an illegitimate way to recapture land use control. Professor Briffault notes that the major obstacle to a successful regional scheme is “whether regionalists will be able to persuade people that their interests are sufficiently tied in with those of the residents or other communities within the region.”²⁴

Many times, regional agencies aspire to realize regional goals in the face of local needs.²⁵ The task at hand calls for an identification of ways that local governments can be maintained and work in collaboration with the regional entity to serve both local and regional needs. Professor Briffault notes that:

²⁰ Parlow, *supra* note 10, at 57 (“[F]ederal and state governments . . . are simply too big, remote, and inaccessible for the average citizen to engage with and participate in.”).

²¹ See generally Sean F. Nolon, *The Lawyer as Process Advocate: Encouraging Collaborative Approaches to Controversial Development Decision*, 27 PACE ENVTL. L. REV. 103 (2009).

²² See Briffault, *supra* note 10, at 17.

²³ Many times when local governments seek to dissolve or consolidate with one another the deeply rooted sense of identity and community hinders, and even blocks, the political process that is involved. See Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1417–19 (2012) (“The concept of community captures a major opposing force after commencement of a dissolution campaign. It is a notion that cityhood defines a place, forges community bonds, and preserves local history. Captured here as well is the idea that bonds—residents with one another, but also residents with their government—are stronger when formed at a small scale, because participation is better and government closer.”).

²⁴ Briffault, *supra* note 10, at 29.

²⁵ See *id.* at 3.

Many of these proposals [to create regional entities] would leave local powers and structures in place, but through a combination of incentives or requirements that local actions conform to regional standards, would superimpose on local decision-making regional goals or norms concerning such matters as the management of new growth, the allocation of affordable housing, or the sharing of the local revenue gains from new property tax base growth.²⁶

While this is true, regional authorities also need to alter the way they govern. A shift from traditional practices to a more collaborative process will ensure that local concerns are considered on the regional level. Such a shift would alter the decision-making process at the regional level to create a process where all stakeholders are involved in regional decisions, including local governments.²⁷ On the other hand, it will also be necessary for local governments to amend their local procedures to include the notions of regional governance and the goals that regional governance seeks to implement.

In some circumstances, local governments feel incentivized to deviate from regional land use goals, especially with respect to regional conservation. For instance, local governments that have the ability to levy property taxes as a source of revenue may be encouraged to relax local zoning laws to increase development by new residents.²⁸ Additionally, local politicians view zoning as a political activity and as a means to obtain job security.²⁹ Local officials will tend to make land use decisions to benefit their constituents, thus increasing their chances of reelection.³⁰ In this respect, local governments are encouraged, or incentivized, to govern through this consumer-based model, whereby they are constantly

²⁶ *Id.* at 5.

²⁷ *See id.* at 6 ("The third component of regionalism is the interest in creating new mechanisms that would be able to articulate regional concerns and formulate and implement regional policies. Regional policy-making does not necessarily require regional institutions.").

²⁸ *See id.* at 8.

²⁹ WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 208 (1985).

³⁰ *Id.*

Federal and state regulations that apply only to small, specific geographic areas should be scrutinized. The opportunity for those landowners adversely affected by the regulations to influence legislators is considerably restricted. They cannot as easily band together with other landowners and allies from other areas, since . . . offering compensation to those adversely affected in well-defined geographic area would seem to be much lower.

Id. at 222.

competing for residents, business, and votes.³¹ In terms of environmental conservation and other regional goals, it is important to align local policies and regional policies to be successful with a comprehensive plan.

Regional land use agencies seek to solve the inherent problems that localism creates, such as the inability to address impacts that are without bounds and intraregional.³² Established principles of ecology state that: “Property does not exist in isolation because the effects of its uses flow outside of the boundaries of ownership.”³³ The notion behind comprehensive planning allows local decisions to be produced within a framework that should take into account the externalities involved in land use determinations.³⁴ In practice, however, local land use planning has a tendency to be individualized and in response to specific projects.³⁵ The recognition that local land use decisions may create negative externalities on surrounding localities supports the argument for regional land use agencies.³⁶ For example, a local

³¹ Parlow, *supra* note 10, at 55–56 (“Local governments fear losing these consumer-voters—and their attendant tax dollars—and thus compete for residents and businesses by offering a distinct package of goods, services, and regulations. Citizens can freely choose where to live or relocate and can thus ‘shop’ for the local government that best meets their needs, interests, and desires. In this regard, localities have an incentive to respond and cater to their consumer-voters. Indeed, local governments must compete for citizens and businesses or face the consequences of an eroding tax base. This market-like competition, in turn, creates an efficient allocation of public goods and services—a desirable result in a metropolitan region.” (citations omitted)).

³² *See id.* at 61–62.

³³ Shelia R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 528 (2006) (internal quotation marks omitted); *see also* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971).

³⁴ *See* Foster, *supra* note 33, at 547.

³⁵ *See id.* (arguing that the liberal use of zoning amendments and variances furthers private interests adversely affects the deliberative processes).

³⁶ Parlow, *supra* note 10, at 58–59 (“[Within the context of a metropolitan area,] localism focuses almost entirely on each individual municipality without concern for interaction with, or externalities imposed upon, neighboring localities. Municipalities in a region are not isolated from one another, where citizens interact with one another solely within the boundaries of their city. While a city’s boundaries once defined the locality and isolated it from other communities, the nature and growth of metropolitan areas have blurred those once clearly demarcated lines. Today, [a] person is likely to live in one locality, work in another, shop in a third, seek entertainment in a fourth, and move through a large number of others in the course of a day. Localities are now more connected and dependent on one another, and this reality leads—or should lead—to public policy decisions that consider the entire region rather than simply the interests of those located within the metes and bounds of a particular locality.” (internal quotation marks omitted)).

government may choose to enhance development adversely impacting surrounding forestland. The adjacent locality is therefore forced to deal with the externalities produced from neighboring land use decisions. The municipality impacted by these externalities does not have any influence in the political process of the government producing the negative externalities and therefore is without recourse.³⁷ A regional land use agency would be able to harness the negative externalities resulting from individual land use choices.

This is not to say that land use planning should be completely taken out of the hands of local governments in these circumstances. To guard against losing the advantages associated with localism, collaborative processes should be mandatory within regional land use schemes. While some forms of collaborative processes are mandated by land use processes, this Article suggests going beyond the traditional form of participation. The best practices discussed in this Article will empower local governments during the regional land use process and produce suitable land use practices to address both local and regional concerns.

This Article will explore two case studies. The first is an analysis of the federal land use scheme on the Fire Island National Seashore and will discuss how the federal government seeks to preempt local control. The second is an analysis of the Adirondack State Park, which will provide an in-depth description of a regional land use authority that is very involved and has designed policies that allow for the concept of localism to be incorporated into the regional agency. The case studies will provide an analysis of the strengths and weaknesses of each system and show how collaborative efforts may increase compliance with regional goals, reduce delays, and address transparency concerns.

II

THE CONSERVATION OF NATIONAL PARKS

The NPS has been charged with the regulation and preservation of the national parks to protect the beautiful natural resources for future generations.³⁸ As a federal agency and a subset of the Department of

³⁷ See Brittan J. Bush, *A New Regionalist Perspective on Land Use and the Environment*, 56 HOW. L.J. 207, 209, 221 (2012).

³⁸ NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, OVERVIEW (2011), available at http://www.nps.gov/news/upload/NPS-Overview_11-7-2011.pdf ("[T]he fundamental purpose of the NPS 'is to conserve the scenery and the natural and historic objects and the

the Interior, the NPS is specifically tasked with focusing on federal parkland that has been deemed a valuable natural resource and thus requires preservation.³⁹ Conservation is a difficult task when land within a park is not entirely federal. The NPS has employed several techniques over the years to address this concern, “including acquisition of land, purchases of easements, and cooperative agreements”⁴⁰ However, the problem remains that certain private lands, without a conservation mechanism attached, may adversely affect the park by deviating from the conservation purposes. One solution employed is federal zoning, which preempts local governments from administering their land use authority.

A. Federal Zoning, Local Governments, and Private Land

Local zoning and land use regulation may not necessarily be the best method for the conservation of wide-ranging natural resources. Many natural resources and environmental concerns transcend local boundaries and thus require regional efforts.⁴¹ Local governments often view the conservation of natural resources in terms of costs and benefits. It may not be worth it for a local government to forgo development for the conservation of open space, and therefore local zoning may not further preservation. To avoid local government issues, the NPS and the Department of the Interior have implemented federal zoning standards over localities within national parks. To properly analyze the federal government’s ability to regulate the use of non-federal land, it is important to examine the history of the Property Clause and subsequent case law.

1. Legal Obstacles: Federal Zoning and the Property Clause

The Property Clause of the U.S. Constitution states that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁴² The Property Clause has been interpreted to limit

wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” (quoting the National Park Service Organic Act)).

³⁹ 16 U.S.C. § 1 (2012).

⁴⁰ John S. Davis, *The National Trails System Act and the Use of Protective Federal Zoning*, 10 HARV. ENVTL. L. REV. 189, 191 (1986).

⁴¹ *Id.* at 218; see Hirokawa, *supra* note 14.

⁴² U.S. CONST. art. IV, § 3, cl. 2.

the federal government's ability to regulate activities taking place on non-federal land.⁴³ Throughout a long history of case law, the Property Clause has been progressively interpreted to allow the federal government to regulate the use of non-federal lands.

In *Kleppe v. New Mexico*, New Mexico challenged the Wild Free-Roaming Horses and Burros Act, which sought to protect "all unbranded and unclaimed horses and burros on public lands of the United States . . . [because they were considered] . . . an integral part of the natural system of the public lands."⁴⁴ New Mexico asserted that Congress had no proof that such animals roamed over public lands and therefore had no jurisdiction to pass legislation for their protection.⁴⁵ The Supreme Court upheld the constitutionality of the act and stated that the ability of the federal government to use the powers granted in the Property Clause over public lands is "without limitation[]." ⁴⁶ Therefore, Congress had the power to reach beyond its territorial limits and regulate the wildlife that was present upon the lands.⁴⁷

Similarly, in *United States v. Brown*, the Eighth Circuit held that Congress can reach beyond its territorial limits and stated that "the congressional power over federal lands . . . include[s] the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands."⁴⁸ In *Minnesota v. Block*, Minnesota challenged the Boundary Waters Canoe Area Wilderness Act, which restricted the use of certain vehicles, including motorboats and snowmobiles, on non-federal land.⁴⁹ The court again relied on *Kleppe* and stated that:

Under [the Property Clause's] authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. Congress clearly has the power to dedicate federal land for particular purposes. As a necessary incident of that power, Congress must have the ability to insure that these lands be protected against interference with their intended purposes.⁵⁰

⁴³ Davis, *supra* note 40, at 234–35.

⁴⁴ *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

⁴⁵ *Id.* at 533.

⁴⁶ *Id.* at 539; *see also* Davis, *supra* note 40, at 237.

⁴⁷ *Kleppe*, 426 U.S. at 538 (1976); *see also* Davis, *supra* note 40, at 237.

⁴⁸ *United States v. Brown*, 552 F.2d. 817, 822 (8th Cir. 1977).

⁴⁹ *Minnesota v. Block*, 660 F.2d. 1240, 1243 (8th Cir. 1981).

⁵⁰ *Id.* at 1249.

Block represents the broad authority currently applied by the federal government when it implements federal zoning standards upon private property within national parks.

2. *Forms of Federal Zoning*

From these interpretations of the Property Clause, the federal government implemented a system of regulating private property that may have an impact on the pristine national parklands. The first technique employed by the federal government involves the federal government merely giving advice to local governments to encourage certain zoning measures and mandates notification of any variance that may be approved by the local planning agency.⁵¹ This technique does not require a set of zoning regulations for the local adoption nor does it provide an enforcement mechanism for the federal government to ensure compliance.⁵²

In the past, the federal government has taken a more direct approach and directly regulated land uses within local boundaries. This process bypasses local agencies and directly regulates private land within the park.⁵³ For example, Sawtooth National Recreation Area is subject to a federal scheme where the federal government directly regulates its land uses.⁵⁴ The Sawtooth National Recreation Area has 75,600 acres with more than 20,000 acres of private land.⁵⁵ Private land within the recreation area is directly regulated pursuant to Public Law 92-400, which allows the Secretary of Agriculture to promulgate land use standards.⁵⁶ In Sawtooth, the only enforcement power is condemnation against noncompliant properties.⁵⁷ Under this scheme, private landowners have the ability to directly communicate with the Forest Service regarding the compliance of its property.⁵⁸ Through these communication avenues, landowners are able to better

⁵¹ Davis, *supra* note 40, at 219–20.

⁵² *Id.* at 220.

⁵³ *Id.*

⁵⁴ *Id.* at 220–21.

⁵⁵ U.S. FOREST SERV. & THE SAWTOOTH SOC'Y, WHAT YOU SHOULD KNOW ABOUT PRIVATE LAND OWNERSHIP IN THE SAWTOOTH NATIONAL RECREATION AREA 1 (2009), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5211589.pdf.

⁵⁶ Act of Aug. 22, 1972, Pub. L. No. 92-400, 86 Stat. 612; U.S. FOREST SERV. & THE SAWTOOTH SOC'Y, *supra* note 55.

⁵⁷ 16 U.S.C. § 460aa-3(b) (2012); 36 C.F.R. 292.14(a) (2013).

⁵⁸ U.S. FOREST SERV. & THE SAWTOOTH SOC'Y, *supra* note 55, at 2.

understand the regulations and maintain compliance.⁵⁹ The Forest Service has noted that the most efficient outcomes result when landowners collaborate with the Service early and often on a development project.⁶⁰

However, direct regulation of land by the federal government is not without concern. Residents traditionally seek land use determinations, such as permits and variances, from the local governing bodies due to the intimate relationship residents have with their local agencies. Under this local process, the landowner does not feel overwhelmed from dealing with a larger governmental entity. However, if landowners are required to handle land use matters on the federal level, there is the potential that they may feel defensive against a larger governmental entity. Further, the federal government agency may be overwhelmed and inundated with local land use matters in a time of scarce human and financial resources. This completely disregards the concept of localism and thus does not capture the advantages to local government regulations, such as increased democratic processes, efficient distribution of services, and the creation of a strong sense of community.

Direct regulation does not allow for a collaborative process. Communication opportunities between the federal and local governments on current land use issues may be difficult with the local government completely preempted by federal involvement. For example, if notification requirements are not set in place, the federal government may be making land use decisions that affect local governments, but the locality may not be aware of the decision or be involved in the process. In essence, the local land use process is completely disregarded and bypassed.

Lastly, the most common federal land use scheme is the “Sword-of-Damocles” approach.⁶¹ This approach has been implemented in many of the national parks around the country, including the two seashore cases mentioned in this Article, the Cape Cod and Fire Island National Seashores.⁶² As an alternative to direct regulation, local governments are mandated to adopt the federal zoning

⁵⁹ *Id.*

⁶⁰ *Id.* at 7.

⁶¹ Davis, *supra* note 40, at 220.

⁶² Davis, *supra* note 40, at 220 nn.190–93, (explaining that in addition to Cape Cod and Fire Island, the Sword-of-Damocles approach has been applied to the Indiana Dunes National Lakeshore, the Sleeping Bear Dunes National Lakeshore, the Whiskeytown-Shasta-Trinity National Recreation Area, and the Jean Lafitte National Historical Park).

standards, promulgated by the NPS, in their local code.⁶³ The NPS and federal government hold condemnation power against all noncompliant properties, including private, but that power is suspended for all property that is compliant with approved local ordinances.⁶⁴

The “Sword-of-Damocles” scheme is a more politically sensitive approach to federal land use regulation. However, it is plagued with enforcement problems and is subject to local government politics.⁶⁵ While procedurally different, the “Sword-of-Damocles” system is not theoretically distinct from direct federal regulation. Federal regulation of private land is masked behind the mandated adoption of federal zoning into local codes. By comparing the systems and recognizing the need for increased collaboration between local governments and federal agencies, it would be beneficial to revise the “Sword-of-Damocles” approach by adding more collaboration between federal agencies, local governments, and residents. The Fire Island National Seashore provides a good example of how this process unfolds and highlights the problems that may result.

3. *The “Sword-of-Damocles” and the Fire Island National Seashore*

When creating the Fire Island National Seashore (FINS) Act, legislators looked to the Cape Cod model and its implementation of the “Sword-of-Damocles” land use scheme as a success story.⁶⁶ The Cape Cod legislation was adopted because the “increasing popularity of Cape Cod threatened to jeopardize the historic and scenic integrity of the area”⁶⁷ The Cape Cod formula did not meet opposition, was described as being implemented with “comparatively little friction,” and was able to capture nearly universal support from localities.⁶⁸ The FINS Act, enacted in 1964, was the beginning of

⁶³ See Charles Gottlieb, *Federalism on Fire Island: A Federal Land Use Scheme Designed to Preserve the Nation’s Natural Resources*, 4 N.Y. Zoning L. & Prac. Rep. (2013) (analyzing in-depth the Fire Island National Seashore Act and how the land use process on Fire Island should be implemented and enforced).

⁶⁴ *Id.*

⁶⁵ Davis, *supra* note 40, at 222.

⁶⁶ See Gottlieb, *supra* note 63.

⁶⁷ *United States v. Certain Land Located in the Cnty. of Barnstable*, 889 F.2d 352, 353 (1st Cir. 1989).

⁶⁸ NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, LAND REGULATION AT FIRE ISLAND NATIONAL SEASHORE: A HISTORY AND ANALYSIS, 1964–2004, at 48 (2008), available at http://www.nps.gov/history/history/online_books/fiis/land_reg.pdf.

federal land use regulation for private properties and local governments on Fire Island.⁶⁹

The “Sword-of-Damocles” model charges the Secretary of the Department of the Interior (the Secretary) with promulgating zoning standards that will be applied to Fire Island properties, including acreage, setbacks, and frontage standards.⁷⁰ Each local government must have its local zoning code approved by the Secretary based on whether the local government has adopted the prescribed federal zoning standards.⁷¹ The Secretary may reject local zoning codes if they “contain[] any provisions that [the Secretary] considers adverse to the protection and development . . . of the area comprising the national seashore”⁷² Lastly, the Secretary may reject a code that does not follow the proscribed procedures for granting a variance within the seashore’s boundaries.⁷³

The main enforcement mechanism on Fire Island is the power to condemn all properties not in compliance with the federal standards or any approved local code.⁷⁴ However, major flaws are inherent in the enforcement mechanism. For instance, Fire Island is comprised of many private properties that predate the act. Such properties are in contrast to the conservation goals that were later expressed in the FINS Act. Unlike the Cape Cod formula, the FINS Act deems all existing properties consistent with the Act and therefore protected from condemnation.⁷⁵ When the Cape Cod formula was enacted, it was largely underdeveloped, and therefore preexisting development did not need protection.⁷⁶ Conversely, Fire Island was largely

⁶⁹ Gottlieb, *supra* note 63.

⁷⁰ See 36 C.F.R. § 28.1 (2013); Gottlieb, *supra* note 63.

⁷¹ 16 U.S.C. § 459e-2(c)–(d) (2012); *see also* 36 C.F.R. §§ 28.13, 28.15 (2013); Gottlieb, *supra* note 63.

⁷² 16 U.S.C. § 459e-2(d)(1) (2012); *see also* 36 C.F.R. § 28.15(a)(1) (2013); Gottlieb, *supra* note 63.

⁷³ 16 U.S.C. § 459e-2(d)(1) (2012); *see also* 36 C.F.R. § 28.15(a)(3) (2013); Gottlieb, *supra* note 63.

⁷⁴ 16 U.S.C. § 459e-2(e) (2012); 16 U.S.C. § 459e-1(e) (2012) (describing three alternatives a landowner may choose from in the event condemnation is pursued under the FINS Act: (1) receiving fair market value in exchange for taking the property in fee simple absolute; (2) retaining a life estate in the property, with a corresponding decrease in the fair market value as determined by standard actuarial methods; or (3) retaining an estate for twenty-five years, with a similar pro-rated decrease in the fair market value).

⁷⁵ 16 U.S.C. § 459e-1(f) (2012); *see also* 36 C.F.R. § 28.2(h) (2013).

⁷⁶ See LEE E. KOPPELMAN & SETH FORMAN, *THE FIRE ISLAND NATIONAL SEASHORE: A HISTORY* 116–17 (2008) (“The Cape Cod National Seashore boundaries include all the important natural features needing protection, but not the major developed areas. Though

developed in 1964 when the act was implemented, which caused the legislature to seek protection for these preexisting properties.⁷⁷ With such a high level of noncompliant preexisting properties on Fire Island, it became imperative that local government enforce the federal nonconforming use standards to transform preexisting properties to compliant properties.⁷⁸

Additionally, the NPS does not have enforcement power against local governments who choose not to adopt the federal standards. NPS enforcement is solely focused on private property owners who are noncompliant with the federal standards or an approved local code and not against local governments who do not adopt the federal standards.⁷⁹ In *Biderman v. Morton*, the court held that plaintiffs were unable to assert an injunction against the local governments' zoning activities, stating:

[The Fire Island National Seashore Act,] quite simply, does not prohibit any zoning action by the various local governments located on the seashore. . . . [T]he Secretary of the Interior is authorized only to condemn property zoned in a manner of which he disapproves—an action which cannot possibly be interpreted as a retroactive declaration of municipal illegality.⁸⁰

The *Biderman* court recognized that the NPS, pursuant to the FINS Act, is unable to enforce or bring actions against local governments for their responsibilities under the Act. This allows the local governments to violate the zoning standards without repercussions felt by the landowners. For example, if a local government seeks to deviate from the federal standards and grants an improper building permit, the locality is not subject to enforcement, but the landowner is now subject to condemnation even though he or she holds a permit from the local agency. By giving the NPS enforcement powers against noncompliant local governments, conservation would increase as a result of federal standards being applied.

privately owned totals approximately 17 percent of all land within the Cape Cod National Seashore after initial federal purchases were completed, much of that private land was in the form of undeveloped parcels and scattered dwellings. The most developed commercial and residential areas of each town were left outside the National Seashore.”).

⁷⁷ See *id.*; see also NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, *supra* note 68, at 1.

⁷⁸ See KOPPELMAN & FORMAN, *supra* note 76, at 116–17; see also NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, *supra* note 68, at 1.

⁷⁹ See 16 U.S.C. § 459e-1 (2012); see also 36 C.F.R. § 28.15 (2013).

⁸⁰ *Biderman v. Morton*, 497 F.2d 1141, 1146 (2d Cir. 1974).

Even where the NPS seeks condemnation, it lacks funding to pay reasonable compensation to acquire the property.⁸¹ A lack of federal funding for acquisition, coupled with the rising property values on Fire Island, has turned the condemnation process into a mere threat.⁸² If local governments grant improper land use decisions and the federal government is unable to enforce using its power of condemnation, conservation becomes unachievable. An examination of recent land use determinations on Fire Island will show how the current regional land use scheme is ineffective due to a lack of collaboration between local governments and the NPS.

4. The Story of Land Use on Fire Island: Past to Present

Through a case study of the “Sword-of-Damocles” approach, as applied to Fire Island, it is apparent that variance requests or code changes cause turmoil within the community and block the conservation efforts of the regional agency.⁸³ Exacerbating the matter, local governments have sought to deviate from the federal regulations. Collaborative methods of decision making are needed any time there is a proposed amendment to the local code or federal regulations, or when any land use decision is made to avoid controversy.

Local government opposition to federal regulations was at issue in *United States v. 0.16 of an Acre of Land*. In that case, preexisting property within the Town of Brookhaven was to be subdivided and developed, so it required a building permit and a variance.⁸⁴ The Town of Brookhaven granted the variance and building permit notwithstanding objections from the NPS, and construction commenced soon after.⁸⁵ As a result, the Secretary of the Interior

⁸¹ See NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, *supra* note 68, at 54.

⁸² See KOPPELMAN & FORMAN, *supra* note 76, at 134; *see also* Gottlieb, *supra* note 63, at 1.

⁸³ The Fire Island National Seashore was created

[f]or the purpose of conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features within Suffolk County, New York, which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population.

16 U.S.C. § 459e(a) (2012).

⁸⁴ *United States v. 0.16 of an Acre of Land*, 517 F. Supp. 1115, 1117–18 (E.D.N.Y. 1981).

⁸⁵ *Id.*

initiated condemnation proceedings.⁸⁶ The court held that the Secretary may condemn part of the property that had been improved and not maintained in accordance with the federal standards.⁸⁷ This case alludes to the fact that, often times, local governments are not compliant, and the NPS enforcement authority acts as a safeguard. However, when enforcement is not carried out properly, the safeguard is ineffective, and local governments and property owners may act without repercussion.

Most applications for land development on Fire Island pertain to variance requests to develop land, erect a structure, or modify either preexisting nonconforming uses or illegal nonconforming uses. Cases at the appellate division, and at the local level, demonstrate a history of noncompliance with the federal standards and recent efforts to attain compliance. The cases reveal that planning boards have been guided by the precedence of past variances. However, if past variances are in violation of the federal standards, they are adverse to the conservation goals set forth by the NPS.

For instance, in *Switzgable v. Board of Zoning Appeals*, the court annulled one portion of an area variance that was granted by the Town of Brookhaven Board of Zoning Appeals (the Board).⁸⁸ The court found that the area variance, which allowed the plaintiff to erect a ten-foot solid fence on his property line, was arbitrary and capricious.⁸⁹ The variance must be supported by a rational basis, and the Board must conduct a balancing test prior to granting the variance.⁹⁰ In this case, the Board cited to comparable structures in the area as a rational basis for the variance; however, as the court noted, those structures were either nonconforming or built illegally.⁹¹ Furthermore, the court noted that the Board did not conduct the required balancing, stating that “the Board failed to engage in the requisite balancing test, disregarding evidence that granting the variances would have an adverse impact upon the physical or environmental conditions in the neighborhood, which is a part of the Fire Island National Seashore.”⁹² The Board also disregarded

⁸⁶ *Id.*

⁸⁷ *Id.* at 1118.

⁸⁸ See *In re Switzgable v. Bd. of Zoning Appeals*, 911 N.Y.S.2d 391 (App. Div. 2010).

⁸⁹ *Id.* at 392–93.

⁹⁰ *Id.* at 391–93.

⁹¹ *Id.* at 392–93.

⁹² *Id.* at 392.

evidence from residents in the area who had “personal knowledge” of the adverse impact that the variance would have as well as alternatives that could be sought.⁹³

Presently, the Town of Brookhaven is in the process of amending its nonconforming use statutes. Prior to recent proposals, and in accordance with the FINS Act, nonconforming uses in the Town of Brookhaven could not be altered unless the alteration was to bring the use back into conformance.⁹⁴ Federal regulations are sympathetic to the fact that nonconforming use standards may need to be relaxed in specific circumstances to allow for recovery from natural disasters, fires, or other hazards.⁹⁵ However, federal regulations only allow reconstruction of the structure to its original dimensions and do not allow for additional alterations.⁹⁶

In the wake of Hurricane Sandy, the Town of Brookhaven introduced Local Law #3 that would allow for nonconforming redevelopment. Under the local law, residents of the Town of Brookhaven located on Fire Island would have the same ability to rebuild as those residents located in the Town of Brookhaven on the mainland.⁹⁷ When proposed, the local law made no mention of nonconforming uses being rebuilt as a result of natural disasters.⁹⁸ If the amendment had specifically allowed for the rebuilding of properties destroyed by natural disasters, then it may have conformed to federal regulations. Controversy has followed these amendments because the language in the local law has been interpreted by some to go beyond the FINS Act.

Pursuant to the FINS Act, the Superintendent of the Seashore must be notified of any local law change and have the opportunity to object.⁹⁹ On January 7, 2013, the NPS, via a letter from Superintendent Chris Soller, made several objections to Local Law

⁹³ *Id.* at 393.

⁹⁴ BROOKHAVEN, N.Y. CODE OF THE TOWN § 85-166(C) (2012), *available at* <http://www.ecode360.com/8597756?highlight=85-66>; *see also* 36 C.F.R. § 28.11 (2013).

⁹⁵ 36 C.F.R. § 28.11(c) (2013).

⁹⁶ 36 C.F.R. § 28.11(c)(4) (2013).

⁹⁷ Brookhaven, N.Y., Introductory Local Law #3 of 2013 (Dec. 4, 2012), *available at* <http://agendapublic.brookhaven.org/DisplayAgendaPDF.ashx?MeetingID=347>. It should be noted that the boundaries of the Town of Brookhaven include land on Long Island as well as land located on Fire Island.

⁹⁸ *Id.*

⁹⁹ *See* 16 U.S.C. § 459e-2(d) (2012); *see also* 36 C.F.R. § 28.15(a)(3).

#3.¹⁰⁰ The NPS stated that while it was evident that the proposed changes were being made for disaster recovery efforts, they still needed to be in conformance with the Federal Zoning Standards, specifically 36 C.F.R. § 28.11(c)(4), and include that intention.¹⁰¹ The letter highlights three concerns that the NPS has with the proposed change.

First, the NPS objected to the fact that the amendments would allow for impermissible intensifications of nonconforming use.¹⁰² Second, the NPS objected to the ability of Fire Island residents to rebuild in the same manner as those located on the mainland section of the Town of Brookhaven.¹⁰³ The NPS noted in the letter that Fire Island is geographically and environmentally distinct from the mainland and thus subject to additional federal zoning laws.¹⁰⁴ Finally, the NPS found the proposed changes to be inconsistent with the 1985 Secretary of the Interior's approval of the Brookhaven Town Code—by allowing for intensification of nonconforming development, failing to address the issues of the Coastal Erosions Hazards Law, and failing to recognize the implications of the uniqueness of Fire Island's setting within a national park—which is premised upon compliance with the Federal Zoning Standard for the Seashore.¹⁰⁵ These comments were reiterated in a letter dated January 14 from the Fire Island Superintendent Soller to the Town of Brookhaven Commissioner of the Department of Building and Fire Prevention, Martin Haley.¹⁰⁶

Controversy was again present on January 16, when an email from Superintendent Soller to Commissioner Haley stated Soller's approval

¹⁰⁰ Letter from K. Christopher Soller, Superintendent of the Fire Island Nat'l Seashore, to Edward Romaine, Supervisor of the Town of Brookhaven (on file with United States Department of the Interior National Park Service Fire Island National Seashore), *available at* http://www.nps.gov/fiis/parkmgmt/upload/Letter_Romaine-TownOfBrookhavenZoning_01-07-2013.pdf.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Letter from K. Christopher Soller, Superintendent of the Fire Island Nat'l Seashore, to Martin Haley, Comm'r of the Dep't of Bldgs. & Fire Prevention of the Town of Brookhaven (Jan. 14, 2013), *available at* http://www.nps.gov/fiis/parkmgmt/upload/Letter_Haley-CommentsOnBrookhavenZoning_01-14-2013.pdf.

of the proposed amendment, stating that “[t]he final language . . . addresses the concerns I raised in my letter of January 7, 2013.”¹⁰⁷

On January 18, a letter from Superintendent Soller to the Town of Brookhaven Supervisor and town board members officially notified the locality of the NPS comments.¹⁰⁸ The letter referenced the draft amendment of the code and noted that the draft did not include any of the NPS’s proposed changes.¹⁰⁹ The letter specifically emphasized that the reconstruction allowed by the amendment

should be tied to a specific situation such as property being severely damaged or destroyed by fire or natural disaster as opposed to the wholesale tearing down of nonconforming buildings and then allowing the rebuilding to previous dimensions without review by the Board of Zoning Appeals. The Town’s code is not designed to perpetuate nonconforming development, thus reconstruction should be limited to instances where reconstruction is not out of choice by a homeowner, but rather due to a hardship.¹¹⁰

The letter closes by noting that without conformance to these recommendations, the Town risks losing the Secretary of the Interior’s continued approval of the Town of Brookhaven Code.¹¹¹

On January 22, 2013, the Brookhaven Town Board held a public hearing to discuss, among other items, the proposed amendments to the Town of Brookhaven zoning code.¹¹² As expected, prior to and during the meeting, the Town Board was presented with various objections to the zoning code changes. Several letters were submitted in opposition to the proposed amendments from environmental groups¹¹³ as well as concerned local residents of Fire Island.¹¹⁴

¹⁰⁷ E-mail from K. Christopher Soller, Superintendent of the Fire Island Nat’l Seashore, to Martin Haley, Comm’r of the Dep’t of Bldgs. & Fire Prevention of the Town of Brookhaven (Jan. 16, 2013, 4:29:25 PM EST) (on file with author).

¹⁰⁸ Letter from K. Christopher Soller, Superintendent of the Fire Island Nat’l Seashore, to Edward Romaine, Supervisor of the Town of Brookhaven (Jan. 18, 2013) (on file with author) [hereinafter Soller-Romaine Letter].

¹⁰⁹ *Id.*; see Brookhaven, N.Y., *supra* note 97.

¹¹⁰ Soller-Romaine Letter, *supra* note 108; see Brookhaven, N.Y., *supra* note 97.

¹¹¹ Soller-Romaine Letter, *supra* note 108; see Brookhaven, N.Y., *supra* note 97.

¹¹² Brookhaven Town Board, Brookhaven Town Board Meeting Agenda (Jan. 22, 2013), available at <http://agendapublic.brookhaven.org/DisplayAgendaPDF.ashx?MeetingID=347>. Due to the volume of issues at the meeting, the meeting was reconvened on January 23, 2013.

¹¹³ On January 21, 2013, the Group for the East End submitted a letter in opposition to the changes. The letter highlighted the necessity for a stringent zoning approval process for Fire Island due to the island’s unique environmental character, and noted that the proposed amendments are in “direct conflict with the stated objections of the National Seashore’s own land use goals.” Letter from Robert S. DeLuca, President, Group for the

The story of the Town of Brookhaven highlights many of the flaws with the current land use system and identifies the competing interests that exist on the seashore. Confusion among the stakeholders and a lack of transparency during the local process has created a land use scheme that is in need of reform. The system is plagued with both inherent and learned enforcement problems as well as a total lack of communication between the stakeholders resulting in very little transparency.

Even the federal zoning standards set in place today represent a deviation from the original purpose and expected results of the FINS Act.¹¹⁵ This deviation has been increasing through a history of improper development and an acceptance of the Act's enforcement weaknesses.¹¹⁶ It has been estimated that fifty percent of the properties on the seashore are legally nonconforming and twenty-five percent are illegally nonconforming uses that were either granted improper variances or never went through a land use approval process.¹¹⁷ The traditional procedures for executing land use policy, such as public hearings and notification requirements, do not represent a meaningful forum where all stakeholders can legitimately be heard. The Adirondack State Park in New York has a similar regional land use scheme and faces similar problems. An examination of the Adirondacks will show that even with few collaborative methods in place, the land use processes that have become customary do not provide meaningful public forums to create consensus-based solutions.

East End, to Edward Romaine, Supervisor of the Town of Brookhaven (Jan. 21, 2013) (on file with author). An opposition letter from Enrico Nardone, Executive Director of Seatuck Environmental Association, opposed the amendment because it would allow for "blanket approval of certain variance requests," which would undermine the important role of the Board of Zoning Appeals to ensure the goals of the National Seashore and general public, including conservation of the island, were considered. Letter from Enrico Nardone, Executive Director of Seatuck Envir. Ass'n, to Edward Romaine, Supervisor of the Town of Brookhaven (Jan. 23, 2013) (on file with author).

¹¹⁴ On January 22, 2013, a letter from concerned citizens Thomas Brown and Meg Switzgable highlighted the need for federal approval of zoning changes and questioned the purpose of the amendments as a response to the destruction of Hurricane Sandy. Letter from Thomas Brown and Meg Switzgable, to Edward Romaine, Supervisor of the Town of Brookhaven, (Jan. 22, 2013) (on file with author).

¹¹⁵ NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, *supra* note 68, at 142–43.

¹¹⁶ *Id.*

¹¹⁷ KOPPELMAN & FORMAN, *supra* note 76, at 134–36.

III

THE HISTORY OF THE ADIRONDACK STATE PARK: THE LAND, THE AGENCY, AND THE COMMUNITIES

While New York has not always sought to protect the Adirondack State Park, state legislators decided to create the forest preserve at the turn of the nineteenth century.¹¹⁸ It was decided that state lands within the park would “be kept forever as wild forest lands.”¹¹⁹ The 1894 state constitutional convention resulted in this declaration being embedded even further into state law when the constitution was amended to include: “The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands.”¹²⁰

The question for policymakers became how should the use of land within the Adirondack State Park be regulated? The Adirondacks, like the Fire Island National Seashore, have local governments and private property owners within the boundaries of the park.¹²¹ In 1967, Laurance Rockefeller, presiding as the chair of the State Council of Parks, proposed turning the Adirondacks into a national park.¹²² Such a plan would allow the NPS to acquire 600,000 acres of privately-held land within the Adirondacks.¹²³ The plan was met with opposition and never gained traction; however, the proposal opened the eyes of state policymakers by allowing them to see that private land within the Adirondacks was a threat to its own existence.¹²⁴ Recognizing this marble cake of land ownership, Governor Nelson Rockefeller, brother

¹¹⁸ See Louise A. Halper, *The Adirondack Park and the Northern Forest: An Essay on Preservation and Conservation*, 19 VT. L. REV. 335, 342 (1995) (citing 1885 N.Y. Laws 482).

¹¹⁹ *Id.*

¹²⁰ N.Y. CONST. art. XIV, § 1.

¹²¹ N.Y. EXEC. LAW § 801 (McKinney 2013) (“In the past the Adirondack environment has been enhanced by the intermingling of public and private land. A unique pattern of private land use has developed which has not only complemented the forest preserve holdings but also has provided an outlet for development of supporting facilities necessary to the proper use and enjoyment of the unique wild forest atmosphere of the park. This fruitful relationship is now jeopardized by the threat of unregulated development on such private lands. Local governments in the Adirondack park find it increasingly difficult to cope with the unrelenting pressures for development being brought to bear on the area, and to exercise their discretionary powers to create an effective land use and development control framework.”).

¹²² Stacey Lauren Stump, “Forever Wild”: A Legislative Update on New York’s Adirondack Park, 4 ALB. GOV’T L. REV. 682, 697 (2011).

¹²³ *Id.*

¹²⁴ *Id.*

of Laurance Rockefeller, decided to study the Adirondacks in an attempt to find a solution to the land use and preservation concerns that private property presented.¹²⁵ As a result, in 1970, the Temporary Study Commission on the Future of the Adirondacks concluded that the natural resources within the Park must be conserved and released a report consisting of several recommendations to that end.¹²⁶ Following that report, the State recognized that:

In the past the Adirondack environment has been enhanced by the intermingling of public and private land. A unique pattern of private land has developed which has not only complemented the forest preserve holdings but also has provided an outlet for development of supporting facilities necessary to the proper use and enjoyment of the unique wild forest atmosphere in the park. This fruitful relationship is now jeopardized by the threat of unregulated development on such private lands. Local governments in the Adirondack park find it increasingly difficult to cope with the unrelenting pressures for development being brought to bear on the area, and to exercise their discretionary powers to create an effective land use and development control framework.¹²⁷

The State recognized that local governments feel pressure to develop; thus local priorities change, and the motivation to conserve natural resources is adversely affected. To mitigate the conflict, New York enacted the Adirondack Park Agency Act (APA Act), which created the Adirondack Park Agency (APA) and shifted the regulation of land to the State, taking local land use control and the associated pressures away from local governments in the park.¹²⁸

A. The Adirondack Park Agency

The purpose of the APA is to “insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park.”¹²⁹ Furthermore, the APA is tasked with the regulation of the use of land within the park. Consequently, the APA shall create the park’s comprehensive plan as well as a land use and development plan,

¹²⁵ *Id.* at 697–98.

¹²⁶ Stump, *supra* note 122, at 698.

¹²⁷ N.Y. EXEC. LAW § 801 (McKinney 2013).

¹²⁸ *Id.*

¹²⁹ *Id.*

which regulates the use of private land within park boundaries.¹³⁰ The APA enabling legislation preempts the home rule authority of local governments to regulate the use of land.¹³¹ The concept behind the preemptive approach is to ensure that the Adirondacks are subject to comprehensive planning, instead of a mixture of local government land use plans that may thwart the State's conservation and preservation interests.¹³²

In the beginning, state land use regulation faced opposition from local governments and Adirondack residents. The constitutionality of the APA Act's ability to abrogate local land use authority was challenged in the courts and upheld. In *Wambat Realty Corp. v. State of New York*, the Court of Appeals of New York decided whether the APA Act violated the home rule protection that is afforded to local governments by the New York State Constitution.¹³³ The court first addressed whether the conservation and protection of the Adirondacks was a state concern, and therefore the regulation of such was left to the State.¹³⁴

New York's Municipal Home Rule Law states that local governments may adopt and amend local laws that relate to its "property, affairs or government."¹³⁵ However, this local home rule power is not without limitation. The home rule law is limited by the state constitution, which states that the legislature has the power to act in relation to "matters other than the property, affairs or government of a local government."¹³⁶ The question in *Wambat* became whether or not the conservation and preservation of the Adirondack State Park was a legitimate state concern and therefore a proper preemption of

¹³⁰ *Id.*; N.Y. EXEC. LAW § 805 (McKinney 2013) ("The Adirondack park land use and development plan us hereby adopted and shall hereafter serve to guide land use planning and development throughout the entire area of the Adirondack park, except for those lands owned by the state.").

¹³¹ *See* Nolon, *supra* note 4, at 525–27.

¹³² *See* N.Y. EXEC. LAW § 801 (McKinney 2013).

¹³³ *Wambat Realty Corp. v. State*, 362 N.E.2d 581, 582 (1977).

¹³⁴ *Id.* at 583.

¹³⁵ N.Y. MUN. HOME RULE LAW § 10(1); *see also* N.Y. CONST. art. IX, § 2; Nolon, *supra* note 4, at 511.

¹³⁶ N.Y. CONST. Art. IX, § 3 ("(a) Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to: (1) The maintenance, support or administration of the public school system, as required or provided by article XI of this constitution, or any retirement system pertaining to such public school system, (2) The courts as required or provided by article VI of this constitution, and (3) Matters other than the property, affairs or government of a local government.").

the municipal home rule. The Court of Appeals ruled without doubt that:

the Agency Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect, not because the motive is to impair home rule, but because the motive is to serve a supervening State concern transcending local interests . . . preserving the priceless Adirondack Park through a comprehensive land use and development plan is most decidedly a substantial State concern¹³⁷

Wambat upheld the State's power to create the APA Act and allowed the State to preempt the local government regulation of land. During this tumultuous time, it was evident that local governments were not in favor of the decision.¹³⁸ In fact, it was noted that most local governments within the Adirondack Park sought to abolish the APA.¹³⁹ Furthermore, local government organizations, such as the State Supervisors and County Legislators Association, the State Organization of County Officers, and the Organization of Villages and Towns, lobbied for the repeal of the APA.¹⁴⁰ Aside from the court's decision in *Wambat*, another concern was the lack of consultation with local governments during the creation of the land use development plan, a land use scheme that they must follow.¹⁴¹ Residents and local officials felt that planning and land use regulation should not be a process left to the State, but should remain intimate with local governments.¹⁴² The case and the concerns that followed represent worries associated with regional governance and losing that sense of localism that is deeply rooted in so many communities.

The largest local complaint was that local governments and residents were not particularly gaining from state land use regulation. For example, a common question from a resident may be why should I bear the burden of preserving the Adirondacks for the benefit of

¹³⁷ *Wambat Realty Corp.*, 362 N.E.2d at 584–85.

¹³⁸ See RICHARD A. LIROFF & G. GORDON DAVIS, PROTECTING OPEN SPACE: LAND USE CONTROL IN THE ADIRONDACK PARK 122 (1981) ("In 1975, a pile of manure was dumped on the front steps of the Adirondack Park Agency's headquarters. 'We've taken yours for the last three years, now here's ours' read the sign planted on top.").

¹³⁹ *Id.*

¹⁴⁰ HOLLY NELSON & ALAN J. HAHN, STATE POLICY AND LOCAL INFLUENCE IN THE ADIRONDACKS 19 (1980); LIROFF & DAVIS, *supra* note 138, at 122.

¹⁴¹ LIROFF & DAVIS, *supra* note 138, at 124.

¹⁴² NELSON & HAHN, *supra* note 140, at 20.

everyone else in the state?¹⁴³ In addition, the actions of the APA and the restrictive land use regulations implemented may have a negative effect on the local property tax base due to a lack of development.¹⁴⁴

Early and often, the APA was criticized by local government for its review procedures and the tight control it has over the land use process. Prior to 1977, not one local government had its land use programs approved by the APA, and, as a result, the APA had jurisdiction over all development projects.¹⁴⁵ Residents did not feel there was a need for the APA to have jurisdiction over smaller projects, such as single-family dwellings or two-lot subdivisions.¹⁴⁶ In 1976, these smaller applications accounted for more than half of all applications submitted to the APA.¹⁴⁷

Opposition brought change to the APA, and in 1975, Governor Carey made a strategic move by appointing Robert Flacke as the Chairman of the APA.¹⁴⁸ Previously, Flacke was the Supervisor for the Town of Lake George in the Adirondacks as well as the president of Fort William Henry, a major tourist attraction. However, more importantly, Flacke was a resident of the park.¹⁴⁹ The appointment of Flacke was an attempt to put a local face on the APA.

Once appointed, Flacke did not waste time, and he set in place a new initiative to change APA procedures. First, he required that APA meetings be open to the public.¹⁵⁰ Second, he delegated more project reviews to the APA staff, while providing a direct avenue for appeals from staff recommendations.¹⁵¹ Third, he sought to rely on more input from local governments regarding agency decisions.¹⁵² Lastly, Flacke noted the importance of establishing a method of collaboration between local governments and the APA when making enforcement decisions.¹⁵³ The implementation of these steps occurred quickly following Flacke and Governor Carey's mandate "to develop

¹⁴³ LIROFF & DAVIS, *supra* note 138, at 147.

¹⁴⁴ *Id.*

¹⁴⁵ NELSON & HAHN, *supra* note 140, at 21.

¹⁴⁶ *Id.* at 22.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 32.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 33. (Flacke was quoted as saying, "I think we're going to say to local governments, here's the problem. What's your solution?").

¹⁵³ *Id.*

‘procedures to improve relations with residents, project sponsors and local governments of the Adirondack Park and to give greater emphasis to the economic problems of the region.’”¹⁵⁴ In his efforts as the head of the APA, Flacke sought to break down the barriers and eliminate the obstacles that were inherent in a regional scheme. He sought to increase the methods of community participation and local government engagement, which signified a new era for the APA and local government relations.

Even with this new era of flexibility and collaboration with residents, local governments, and project sponsors, the APA was still expected to strike a balance between flexible planning and environmental conservation. In the 1970s, the APA implemented the Local Planning Assistance Section to help communities develop their local plans.¹⁵⁵ The program’s success was highlighted in 1977 when towns started to finish their local land use plans with the help of the APA.¹⁵⁶ By mid-1979, nine towns had their local land use plans approved by the APA and several more were headed in that direction.¹⁵⁷

B. The APA and Local Governments: The Road to a Collaborative System

Today, the APA seeks to maintain a balance of flexibility and environmental conservation through a collaborative means of land use regulation. Early on, the APA recognized that effective land use regulations at the state level require “a combination of voluntary compliance and the ability to monitor potential violations and enforce compliance when infractions occur.”¹⁵⁸ Currently, APA legislation and regulations seek to implement this combination of voluntary compliance with regulatory enforcement through the local land use program and other procedures. Adding to the collaborative efforts of the APA and the desire to involve local governments and residents,

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 34.

¹⁵⁶ *Id.* at 35.

¹⁵⁷ *Id.* (“[As of 1979, p]lanning elements were completed in 33 communities but had not yet been submitted to the APA. Sixty-nine out of 107 town and villages in the park, representing three-fourths of the park area’s population, had requested and received assistance from the agency. Of these that had not, most had their own pre-APA plans or controls in effect.”).

¹⁵⁸ *Id.* at 38.

the APA Act created the Local Government Review Board, which acts as a consultant throughout APA procedures, reviews, and rulemaking. These two collaborative mechanisms are examples of how the APA and the State have encouraged and integrated flexibility and collaboration while regulating the use of land within the Adirondack Park. The process is an attempt to capture the much needed, and sought after, advantages of localism by incorporating local concerns and interests within the regional goals and decisions.

1. The Local Land Use Program and Agency Review

The Local Land Use Program is an example of how the APA seeks to work with local governments, allowing them some control over their land use decisions, while maintaining proper oversight and enforcement to ensure conservation.¹⁵⁹ The APA Act states:

The agency is authorized to review and approve any local land use program proposed by a local government and formally submitted by the legislative body of the local government to the agency for approval . . . [T]he agency shall review the local land use program and approve or disapprove it, or approve it subject to conditions.¹⁶⁰

The local plan shall be in conformance with certain criteria laid out by state law and APA regulations; for example, the local land use plan must be “in furtherance and supportive of the land use and development plan.”¹⁶¹

When reviewing the local plans, the APA shall consult with various entities. For instance, the APA is required to consult with appropriate public agencies and furthermore must ask the local government review board and regional planning associations to comment on the local land use programs being considered.¹⁶² More importantly, the APA shall “encourage and assist local governments in the preparation of local land use programs.”¹⁶³

¹⁵⁹ N.Y. STATE ADIRONDACK PARK AGENCY, APA APPROVED LOCAL LAND USE PROGRAM INFORMATION SHEET (2011), *available at* http://www.apa.ny.gov/Local_Government/LGS/ALLUP_Info_Sheet.pdf.

¹⁶⁰ N.Y. EXEC. LAW § 807(1) (McKinney 2013).

¹⁶¹ *See id.* § 807(2)(a); *see also* N.Y. COMP. CODES R. & REGS. tit. 9, §§ 582.2-582.4 (2013). The land use and development plan will be discussed later in the article but is the guiding document for all land use planning and development within the entire state park, including state and private land and created by the APA. N.Y. EXEC. LAW § 805.

¹⁶² N.Y. EXEC. LAW § 807(2)(g)(6) (McKinney 2013).

¹⁶³ *Id.* § 807(2)(g)(7) (“The [APA] shall encourage and assist local governments in the preparation of local land use programs, including the provision of data, technical assistance and model provisions. Such model provisions shall be made available by the

Local governments, pursuant to the municipal home rule law, shall have the authority to regulate preexisting land use or development or any pre-filed subdivision plat.¹⁶⁴ However, new development projects are divided into two classifications: Class A and Class B.¹⁶⁵ Local governments with APA-approved land use plans will retain jurisdiction over the review of Class B projects.¹⁶⁶ Conversely, the review of all Class A projects are completely within the jurisdiction of the APA, with consultation and collaboration from local governments and agencies.¹⁶⁷ The APA also retains jurisdiction over Class B projects that are not governed by an APA-approved local land use plan.¹⁶⁸ This process is very different from how the NPS regulates the use of land on the Fire Island National Seashore. In this model, the APA is the main permitting authority and may delegate that authority to local governments with approved codes. Conversely, on Fire Island, the NPS is not the permitting agency and furthermore does not have such strict control over local government codes; it is merely a stakeholder in the process. The APA model allows for strict land use regulation by the APA, but does not completely circumvent the local land use process. This allows local governments to retain some control and is a means of incorporating the advantages of localism, such as increased democratic processes and a strong sense of community.

agency as soon as possible after the effective date of the adoption of the land use and development plan.”).

¹⁶⁴ *Id.* § 807(2)(g).

¹⁶⁵ See N.Y. COMP. CODES R. & REGS. tit. 9, § 572 (2013); see also N.Y. EXEC. LAW §§ 810(1)–(2). While each classification is described in great detail in the implementing legislation, a few examples can be identified to highlight the differences. Classification of a project as A or B depends on size, intensity, and location. The APA Act explains how different projects within the various land use classifications (described in the Land Use and Development Plan) may alter whether the project is Class A or B, classifications include: hamlets, moderate intensity use, low intensity use, rural use, resource management, and industrial use. When designating these uses the APA relied on existing land use patterns, physical limitations (slopes, soils, and elevation), unique natural features (waterfalls and gorges), biological and ecological considerations (habitats, wetlands, vegetation, etc.), and public considerations such as historical sites, community character, and open space. From these land use classifications the legislature proscribed Class A and B projects. See *id.*

¹⁶⁶ See N.Y. EXEC. LAW §§ 809, 810(2) (McKinney 2013).

¹⁶⁷ See N.Y. EXEC. LAW § 809(1) (McKinney 2013); N.Y. COMP. CODES R. & REGS. tit. 9, § 573.1 (2013).

¹⁶⁸ See N.Y. EXEC. LAW § 809(1) (McKinney 2013); N.Y. COMP. CODES R. & REGS. tit. 9, § 573.1 (2013).

In effect, the Act transfers land use regulation for Class B projects from the APA to the towns. Upon the application of a Class B project in a local government with an approved plan, the local government must provide the APA with notice.¹⁶⁹ After such notice is given, the APA has standing to participate in the local review process and a challenge under article 78 caused by an issuance or non-issuance.¹⁷⁰ As a part of this transfer, local governments with approved plans may also regulate variances from shoreline restrictions.¹⁷¹

The APA is not without monitoring control over local governments, their land use programs, and Class B projects. After consulting with the Adirondack Local Government Review Board, the APA shall have the jurisdiction to revoke its approval of certain local government land use programs as well as reexamine Class B projects. The agency may determine by a two-thirds vote that the local government having jurisdiction has “repeatedly or frequently failed or refused, after due notice and requests from the agency . . . to administer or enforce the approved local land use program to adequately carry out the policies, purposes and objectives of the approved program or of the land use and development plan.”¹⁷² This veto power is absent on Fire Island and represents a process whereby the regional authority can ensure that regional goals are being achieved through the designated local processes.

In circumstances where the APA has jurisdiction over the project, collaboration with local agencies still exists. The APA has the authority to review and approve all Class A projects as well as all Class B projects that are not located within a local government with a valid or approved local land use program.¹⁷³ During this review process, the application and related information is shared with several local government bodies.¹⁷⁴ Upon receipt of an application for such a project, a brief description of the project shall be provided to the Local Government Review Board, the chair of involved county planning boards, the chair of the involved regional county planning board, and certain officials on applicable local government planning

¹⁶⁹ N.Y. EXEC. LAW § 808(2) (McKinney 2013).

¹⁷⁰ *Id.*

¹⁷¹ N.Y. COMP. CODES R. & REGS. tit. 9, § 582.1(a)(1) (2013).

¹⁷² N.Y. EXEC. LAW § 808(4) (McKinney 2013).

¹⁷³ N.Y. EXEC. LAW § 809(1) (McKinney 2013); N.Y. COMP. CODES R. & REGS. tit. 9, § 573.1 (2013).

¹⁷⁴ See N.Y. EXEC. LAW § 809(2)(a) (McKinney 2013).

boards where the project is proposed.¹⁷⁵ The determination whether or not to hold a public hearing is made based on APA evaluations or local government review board comments that suggest the project may be disapproved or will only be approved with conditions.¹⁷⁶ The Local Government Review Board shall have the ability to issue advisory comments on all projects being reviewed by the APA.¹⁷⁷

Local governments with approved plans have the ability to hear applications requesting certain variances from the local land use plan, and upon the receipt of an application, the local governing body shall give written notice to the APA.¹⁷⁸ If the variance is granted by the local governing body, it will not take effect for thirty days, during which time the APA may determine that the variance was not granted with the proper statutory basis of “practical difficulties or unnecessary hardships.”¹⁷⁹ If the APA makes this determination, it has the authority to reverse the local decision to grant the variance.¹⁸⁰ If such a reversal occurs, the parties shall have standing to challenge the APA decision in court during an Article 78 proceeding.¹⁸¹

These many checks and balances most certainly represent enforcement measures that are lacking on Fire Island and that are required during any regional land use scheme. It is a form of enforcement against local governments that is necessary for the proper functioning of a regional authority. The regional authority, the APA, is able to ensure its goals are being met through constant oversight. Meanwhile, local governments are provided with legal and legitimate ways to incorporate their concerns into the planning process while maintaining a strong sense of community and identity. In theory, this is designed to encourage local governments to participate in the APA model instead of deviating from the system, a trend that is present on the Fire Island National Seashore.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* § 809(3)(d).

¹⁷⁷ *Id.* § 809(4).

¹⁷⁸ *Id.* § 808(2) (This applies to all local governments in the Adirondack State Park with approved local land use plan, except in Hamlets.).

¹⁷⁹ *Id.* § 808(3).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

2. *The Adirondack Local Government Review Board*

The Adirondack Local Government Review Board (Review Board) plays a key role in APA review procedures. In 1973, the New York Legislature created the Review Board to “assist[] the Adirondack park agency in carrying out its functions, powers, and duties.”¹⁸² The Review Board is to consist of twelve members, each a resident of one county within the park, appointed by their respective local governments.¹⁸³ The core functions of the Review Board are to (1) monitor the administration and enforcement of the Adirondack Park land use and development plan and periodically report, and (2) make recommendations concerning the land use and development plan to the governor, the legislature, and county legislators from the affected counties.¹⁸⁴

The creation of the Review Board came at a time when local residents were feeling detached from the APA and its policies.¹⁸⁵ As such, the Review Board initially consisted of agency critics who many believed were the voice for developers.¹⁸⁶ The Review Board seemed pro-development at the time because the agency had appeared to abandon the concept of local economic development in the face of conservation, and the Review Board sought to reverse this notion.¹⁸⁷ The sentiment of the Review Board members reflected that of all residents in the park: that the restrictive measures placed by the APA were a concern for local tax revenues.¹⁸⁸ This conflict directly reflects the classic debate between localism and regionalism. Local governments needed a forum to voice their concerns for inclusion in the regional process, and the creation of the Review Board provided such a forum. The Review Board indicates that local government should be involved in the regulation of local Adirondack lands and that local involvement is beneficial during the planning process. However, project review through the APA is an arduous task and is inundated with delays and a lack of transparency. The problems with the APA process are best described through an analysis of a recent

¹⁸² N.Y. EXEC. LAW § 803-a(1) (McKinney 2013).

¹⁸³ *Id.* (“No more than one member shall be a resident of any single county.”).

¹⁸⁴ *Id.* § 803-a(7).

¹⁸⁵ LIROFF & DAVIS, *supra* note 140, at 130.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

development in the Adirondacks that seeks to increase the economic development in a suffering community.

3. Recent Major Development: The Adirondack Club and Resort

Recently, controversy has surrounded the Town of Tupper Lake, New York, where developers have taken on a decade-long battle to build the Adirondack Club and Resort.¹⁸⁹ The Adirondack Club and Resort is the largest development the APA has ever approved and includes more than 650 units of housing, a hotel, a ski area, a marina, and an equestrian center all on 6,300 acres of land.¹⁹⁰ The Town Supervisor has stated that “without something happening . . . we’re going to be a ghost town.”¹⁹¹ This is because, like most Adirondack towns, Tupper Lake is plagued with a depressed economy and in need of economic development. In response to this need for economic development, the APA voted ten-to-one to approve the project, but included strict conditions.¹⁹² The permit conditions include an earth-hued color scheme, minimal vegetation clearing, downcast lighting, eighty-five percent of property left in its natural state, and 4,740 acres reserved as backcountry resource management land.¹⁹³ However, these permit conditions were unconvincing to local environmental groups that oppose the project and are fighting the approvals in state court.

Protect the Adirondacks! and the Sierra Club have joined forces with some local residents to file a lawsuit against the State of New York over the approval procedure concerning the Adirondack Club and Resort. The lawsuit challenges the APA’s approval and argues that “APA officials kowtowed to the developer’s wishes, burying information detrimental to the project and even letting outsiders rewrite its work.”¹⁹⁴ The 146-page complaint sets forth several

¹⁸⁹ Lisa W. Foderaro, *In the Adirondacks, Joy and Fear Over What a Resort May Bring*, N.Y. TIMES, Feb. 8, 2012, http://www.nytimes.com/2012/02/09/nyregion/in-struggling-tupper-lake-resort-project-creates-rift.html?pagewanted=all&_r=0.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Jonathan Monfiletto & Doug Buchanan, *APA Gives OK to Tupper Lake Resort Project*, WATERTOWN DAILY TIMES (Jan. 20, 2012), <http://www.watertowndailytimes.com/article/20120120/NEWS09/120129996>.

¹⁹³ Foderaro, *supra* note 189.

¹⁹⁴ Hart Seely, *In the Adirondacks, a Development Battle Pits Neighbor Against Neighbor*, POST-STANDARD (Sept. 2, 2012), http://www.syracuse.com/news/index.ssf/2012/09/tupper_lake_development_projec.html.

allegations as to the APA process, including that the agency staff allowed the developer to write the permit and that the public, APA members, and other parties to the matter lacked proper notifications during the process.¹⁹⁵ Furthermore, the complaint alleges that the APA did not have enough ecological information about the development nor did it request the studies necessary to approve the permit.¹⁹⁶ The development itself has created friction within the community, and this new lawsuit has exacerbated the tension. Some view this lawsuit as frivolous and a waste of taxpayers' money while others feel the suit is necessary to ensure transparency and accountability is a part of the APA process.¹⁹⁷

The controversy over the Adirondack Club and Resort represents a shift whereby the APA is more sympathetic to the economic needs and concerns of the local government. Nonetheless, local environmental groups have sparked conflict and delayed the project, resulting in costly litigation. A solution to the delay and controversy may be reforming the regional land use scheme to install an even more collaborative process. While collaborative measures between local governments and the APA are in place, a more comprehensive collaborative process is needed to increase transparency and consensus-based land use decisions that will avoid costly litigation.

The case of the Adirondacks is distinct from Fire Island for many reasons. Most notably, the APA has taken a more hard-lined approach when dealing with local governments and their ability to regulate the use of land, but it still seeks to ensure that they play a role in the process.¹⁹⁸ For instance, most permitting is done through the APA or an APA-approved mechanism. Conversely, on Fire Island, local governments and the NPS seem to be working separately and distinctly from one another, causing a lack of conservation and no accountability. Each case study would benefit from collaborative

¹⁹⁵ *Id.*; see Complaint, *In re Protect the Adirondacks! Inc., v. Adirondack Park Agency*, 969 N.Y.S.2d 805 (N.Y. Sup. Ct. 2013) (No. 1682-12) (Mar. 20, 2012), available at <http://www.protectadks.org/wp-content/uploads/2012/03/PetitionC.pdf>.

¹⁹⁶ Complaint, *supra* note 195, at 3.

¹⁹⁷ See Jim LaValley & Bob Glennon, *Is the Law Suit Over Tupper Resort Frivolous?*, ADIRONDACK EXPLORER, July/Aug. 2012, available at <http://www.protectadks.org/wp-content/uploads/2012/07/AdirondackExplorerAPA-ACRDebate7.12.pdf>.

¹⁹⁸ N.Y. EXEC. LAW § 801 (McKinney 2013) ("A further purpose of this article is to focus the responsibility for developing long-range park policy in a forum reflecting statewide concern. This policy shall recognize the major state interest in the conservation, use and development of the park's resources and the preservation of its open space character, and at the same time, provide a continuing role for local government.").

decision-making processes because they encourage transparency, accountability, and create consensus-based decisions that all stakeholders will be comfortable following.

IV CONSTRUCTING A COLLABORATIVE LAND USE SCHEME: COOPERATIVE FEDERALISM AND COLLABORATIVE STAKEHOLDER ENGAGEMENT

Cooperative federalism is referred to as a collaborative process that suggests “governmental actors [are] engaged in negotiated cooperation within multiple and interdependent networks.”¹⁹⁹ This notion requires the various levels of government to work together instead of working separately.²⁰⁰ There are several benefits to implementing a cooperative and collaborative process. First, cooperative federalism brings diverse perspectives to the table, allowing for multiple solutions to address policy concerns.²⁰¹ Second, collaboration promotes open dialogue between the stakeholders and the sharing of information for collaborative solutions.²⁰² Third, collaborative federalism fosters redundancy and thus acts as a safeguard for the promotion of a particular policy.²⁰³ Lastly, with various stakeholders collaborating, accountability and transparency is present in all regulatory procedures.²⁰⁴ Furthermore, when various levels of governments are involved, excessive influence from interest groups is tamed, which leads to well-thought-out decisions.²⁰⁵

Cooperative federalism and regional governance go hand-in-hand. Scholars suggest that three forms of regional government exist. The first is the formation of regional units without the disruption of local government power to address regional concerns.²⁰⁶ The second

¹⁹⁹ Denise Scheberle, *The Evolving Matrix of Environmental Federalism and Intergovernmental Relationships*, 35 *PUBLIUS* 69, 70 (2005); see also Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 *STAN. ENVTL. L.J.* 397, 448–49 (2008).

²⁰⁰ Sovacool, *supra* note 199, at 442–48.

²⁰¹ *Id.* at 448–49.

²⁰² *Id.* at 449.

²⁰³ *Id.* at 450.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Parlow, *supra* note 10, at 63–64.

“involves preserving local power but allowing for a radical reformulation of how local government may exercise their various powers.”²⁰⁷ The last creates a regional government that is in charge of ensuring that regional policies are achieved and that local decisions are not adverse.²⁰⁸ From these three models, many different structures have emerged. Old regionalism represents a structure in which all decisions are made at the regional level and local government autonomy is absent.²⁰⁹ This model does not represent a best practice because it does not allow for collaboration between government stakeholders and therefore will not preserve the advantages of localism.

In the case of the Fire Island National Seashore, the NPS is a regional system that can best be described as not completely circumventing the local process, but uniquely mandating federal standards without any enforcement power to ensure compliance. This combination of regional concepts is a detriment to the conservation of the national seashore because local governments act separately in pursuit of local goals. On the other hand, within the Adirondack State Park, the APA has been granted extensive enforcement power over local government land use practices, but it maintains a sense of local participation that has preserved some local autonomy. While the APA processes are able to control the negative externalities created by individual local actions, the regional authority has been accused of lacking transparency and therefore is in need of collaborative methods.

For regionalism to be successful, localities must feel as though local concerns are considered during the advancement of regional goals. Vital to this concept are active local governments and community engagement in regional decisions. In the past, this trend has been identified as “new regionalism,” which varies depending on the regional and local concerns. The consolidation model suggests that one regional government should be created to address problems that transcend local governments.²¹⁰ This structure is suggested to solve the problem of fragmentation that local governments create, which adversely impacts the conservation of large parklands.²¹¹ The

²⁰⁷ *Id.* at 64.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 64–65.

²¹¹ *See id.* at 65.

multitiered model suggests that different levels of government should handle the problems for which they are best situated.²¹² The linked functions approach and the complex networks approach do not require a regional governing authority, but encourage inter-municipal agreements and the sharing of services between localities.²¹³

The inclusion of local governments in the regional process is a pillar of the new regionalism approach. As such, it has been noted that

[m]odern regional initiatives should be achieved through voluntary collaboration as opposed to the creation of general-purpose metropolitan governments that supplant local authority. New regionalism's normative goals are similar to those at the heart of local government law: "(1) equity and inclusion within, and amongst, self-defined territorial communities; (2) democratic participation; and (3) efficient and accountable government." Unlike unbridled localism, new regionalists argue that institutional arrangements and regulatory schemes must promote benefits within a region as a whole as opposed to individual localities within a metropolitan region. By advocating for voluntary collaboration among localities on a regional level, new regionalism addresses localism's "failure to: (1) resolve cross-border, multi-issue challenge; (2) promote regional equity amongst independent localities; and (3) foster participation and collaboration across local boundaries."²¹⁴

The concept of new regionalism can be taken a step further and break free from the traditional forms of public participation that have proven to be ineffective.²¹⁵ Legislation that enables regional land use authorities should require collaborative forms of decision making to engage localities in regional decisions.

Both the APA and the NPS represent regional land use schemes that have altered the autonomy of local governments. The NPS, and

²¹² *Id.* at 65–66 (“Under this approach, independent local governments might be responsible for providing police and fire services, while the broader regional government might deal with transboundary issues such as transportation.”).

²¹³ *Id.* at 66–67.

²¹⁴ Bush, *supra* note 37, at 226–27; *see also* Parlow, *supra* note 10, at 65 (“The new regionalist approach thus seeks to harness existing local governments and encourage and spur cooperation among them in a manner that benefits the entire region.”).

²¹⁵ *See* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 242–43 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) [hereinafter ENVIRONMENTAL JUSTICE]; Patricia E. Salkin & Charles Gottlieb, *Engaging Deliberative Democracy at the Grassroots: Prioritizing the Effects of the Fiscal Crisis in New York at the Local Government Level*, 39 FORDHAM URB. L.J. 727, 768 (2012).

the corresponding land use process on Fire Island, is an example of a regional authority with weak enforcement power that has not attempted to collaborate with local governments. As a result, local governments maintain autonomy and are rebelling against the NPS, adverse to regional goals. Conversely, the APA is a stronger model whereby the regional authority has more control over the actions of involved local governments. In an attempt to not strip away all local autonomy, the APA has implemented some collaborative methods; however, more integrated and nontraditional collaborative methods will prove beneficial. The following Sections will introduce procedures for collaborative decision making that should be included in all regional land use processes.

A. Engaging the Stakeholder: Collaborative Land Use and Environmental Policy

Public participation is a core principle in any government action. This is especially true in the field of land use regulation. Public participation for land use processes is usually authorized by the enabling legislation, which allows an entity to regulate the use of land.²¹⁶ Parties are numerous and might include the developer, residents, community members, and government agencies. If, instead of applying the traditional adversarial approach to land use decisions, the affected parties embraced the notions of collaboration, a more efficient system would prevail.

The traditional land use and administrative process has remained stagnant over the years and includes an application or proposed rulemaking, notice of the application or proposed rulemaking, a public comment period, and a final decision. As a rule, the government is the decision maker for any land use or rulemaking decision, and the parties participate through a trial-like process where arguments can be heard.²¹⁷ A recognized flaw is an inherent psychological difficulty for adversarial parties to work constructively towards a mutual solution.²¹⁸ In essence, the process becomes a battle based on misinformation and a fear of losing. Therefore, parties spend a large amount of time and money in an attempt to gain an advantage over the other.²¹⁹ Professor Sean Nolon states that:

²¹⁶ Nolon, *supra* note 21, at 108.

²¹⁷ *Id.* at 113.

²¹⁸ *Id.*

²¹⁹ *See id.*

Once embroiled in a controversy, parties rarely see past their differences and their interactions take on a combative and competitive tone. They view each other as the archetypal foe: developers as rapacious, greedy and deceitful, officials as incompetent, corrupt and unresponsive and opponents as parochial, hypocritical and untrustworthy. The overwhelming sense is that there is no common ground and the only option is to prepare for battle and hope for a quick victory by defeating the other side.²²⁰

The traditional method that is used to regulate the use of land must be reformed to eliminate such a distrustful process. Public participation and more collaborative methods have the ability to open the dialogue between parties involved in the “battle” and allow for more thorough, creative, and universally-accepted land use decisions.

Arguably the most important and deeply-rooted element of the traditional process is public notice, where the public is placed on notice of a land use application or a proposed administrative action and has the chance to respond.²²¹ Public notice and comment requirements are the conventional forms of public participation in environmental law; however, scholars note that “methods of public notice and comment periods in environmental law are ineffective because there is no requirement that the decisions making deliberate in any meaningful way over the public comments.”²²² Consequently, the public comment periods have evolved into a “decide, announce, and defend” process, where the governmental decision maker has more than likely reached an internal decision, which is presented to the public for comment and then defended against those comments.²²³ This evolved process leaves no room to fully engage the public in the formulation of policy.²²⁴ This lack of dialogue creates “a poor forum for extensive development of information, a shared baseline of

²²⁰ *Id.* at 127.

²²¹ Sean F. Nolon, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, 12 CARDOZO J. CONFLICT RESOL. 327, 355 (2011) (“The National Environmental Policy Act, the Freedom of Information Act, the Administrative Procedure Act, and the Toxic Release Inventory are a few examples of laws that have increased opportunities for citizen input and have increased transparency.”).

²²² Salkin & Gottlieb, *supra* note 215; see ENVIRONMENTAL JUSTICE, *supra* note 215, at 242–43.

²²³ John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 908 (1998).

²²⁴ Salkin & Gottlieb, *supra* note 215, at 768.

understanding, and the development of a consensus,” which are key components to any collaborative process.²²⁵

Collaborative public participation techniques are not a substitute for required public participation procedures, but should be coupled with the traditional forms of participation mandated by enabling legislation.²²⁶ The models that are discussed below include participatory planning, citizen advisory groups, and negotiated rulemaking. Each has its own application and can provide benefits to certain land use debates. The Fire Island and Adirondack Park case studies each present different circumstances where the collaborative process can be incorporated, or improved upon, to allow for meaningful public participation that will enhance conservation efforts and the relationship between all levels of government and the community.

1. Participatory Planning and Community Advisory Groups

Participatory planning seeks to engage community members to serve an advisory role during important land use policy decisions in their community.²²⁷ During the participatory planning process, the community member advisors are not meant to reach a conclusion or policy decision concerning the debated policy, but they are expected to identify the various priorities that exist throughout the broad reach of community members participating.²²⁸ This process has been used to accumulate information on financial and natural resource management, to create energy goals, and to allow underprivileged populations to take part in policy decision making.²²⁹

²²⁵ ENVIRONMENTAL JUSTICE, *supra* note 215, at 243 (internal quotation marks omitted); *see* Salkin & Gottlieb, *supra* note 215, at 768.

²²⁶ *See* Nolon, *supra* note 21, at 113–14 (“Unfortunately, parties typically assume that required processes cannot be supplemented because they equate ‘required’ with ‘exclusive.’ While the required process does specify what a board must do in order to make a decision, the required process imposes a minimum, not a maximum. The government must hold a public hearing, the applicant must notify adjacent property owners, and the government must make a decision within a given time frame. These mandates do not bar the government from suggesting or requiring additional procedures in appropriate circumstances.”).

²²⁷ Nolon, *supra* note 221, at 357 (“Participatory planning refers to practices that engage citizens to serve a central advisory role in making important and often complicated policy decisions that do not require specified technical experience or knowledge.”).

²²⁸ *Id.* at 358.

²²⁹ *Id.* at 357–58.

Similarly, community advisory groups are gaining more and more attention, especially in the field of environmental justice where disadvantaged community members are in need of a more engaged platform to voice their concerns.²³⁰ It is suggested that community advisory groups can be created through statute or agency rules that mandate stakeholders of a particular conflict over a governmental decision collaborate on the issue to flesh out possible solutions.²³¹ The decision-making body shall choose stakeholders that have the greatest interest in the specific matter.²³² As with any collaborative roundtable discussion, the members should include government officials, local residents, property owners, advocates, businessmen, and, more importantly, technical experts when the situation is of a highly technical nature.²³³

The actual deliberations of the advisory committee should be more involved than the traditional public hearing type of public participation. An advisory group should actively deliberate and communicate with each other in an open forum to develop a resolution based on common grounds.²³⁴ Whether or not a consensus is formed during group discussions, a community advisory group can still be successful by narrowing the issues, highlighting stakeholder concerns not otherwise considered, compiling a list of possible solutions to work from, and identifying areas where solutions presently exist.²³⁵

Advisory groups and committees can come in many different forms, but they should always be tailored to the task at issue.²³⁶ Diversity is important when forming an advisory group in the context

²³⁰ See Salkin & Gottlieb, *supra* note 217, at 767.

²³¹ See *id.* at 768; see also Applegate, *supra* note 225, at 921.

²³² See Salkin & Gottlieb, *supra* note 217; see also Applegate, *supra* note 225, at 921.

²³³ Shelia Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 479 (2002).

²³⁴ *Id.*

²³⁵ Applegate, *supra* note 225, at 921.

²³⁶ Salkin & Gottlieb, *supra* note 217, at 770. ("Many jurisdictions employ the use of advisory committees in various forms, and it is important to understand the context in which they were created, who appointed the members, and exactly what their charge or mission is. For example, some committees may consist of a small group of people selected by public officials with unknown motives (e.g., they could have been selected for independent expertise or they could have been selected for more partisan reasons). Advisory Committees may conduct deliberations in public or behind closed doors, and they may or may not seek to employ methods to engage broader public input to inform their deliberations or ultimate recommendations.").

of a regional land use decision that has several different interested parties. Diversity can mean cultural, geographic, or political, but, most importantly, all interested parties must be involved or represented in the collaborative proceedings.

In the case of the APA, the Local Government Review Board sits as an advisory review committee. They are enabled to act as advisors to development decisions as well as to the future of the land use development plan. The APA seeks their input as they represent local government constituents. The Local Government Review Board provides an avenue for local governments to be heard at the regional level. Local governments are therefore represented as part of the decision-making process, and they do not seem as distant from the regional authority.

The goal of these committees is to engage in consensus-building discussions and tear down the walls that block transparency. The result should include regulatory conformance, reduction of costly litigation, and assurance that the regional authority is accountable for its actions. During the approval process for the Adirondack Club and Resort, if all stakeholders, and not just the Review Board, had been involved as advisory groups, the decade-long process may have been expedited. Additionally, the lawsuit against the APA alleging transparency concerns would have been avoided. This collaborative method, if employed as best practices, would make the process truly transparent by involving all stakeholders at the early stages and providing them a meaningful forum. Such participation would be outside of and in addition to the traditional public comment procedures.

A local government review committee, or a review committee of any stakeholder group, is absent on Fire Island. As a result, local governments, such as the Town of Brookhaven, are distant and uncommunicative with the NPS. If this were not the case, local governments would not feel the need to rebel against federal regulations, which are designed to conserve the national park. Creating this avenue for local government representatives, among other stakeholders, opens up the lines of communication and eases tensions between the parties. Such a participatory planning tactic is a best practice for a regional land use scheme that seeks to preserve the benefits of localism while curbing land use practices adverse to the regional goals.

2. Negotiated Rulemaking

Negotiated rulemaking is a collaborative process that invites affected parties into the policymaking arena. The process is designed to supplement the required process for administrative rulemaking typically prescribed by the State's Administrative Procedure Act.²³⁷ By allowing stakeholders of a proposed rule to engage in roundtable discussions, a more legally defensible and thorough rule or decision will result, avoiding the pitfalls of future challenges.²³⁸ If all affected parties can reach an agreement, then each stakeholder group is seemingly represented in the decision, assuming each party is properly identified, which lowers the chances of an unfavorable rule and increases the probability of compliance.²³⁹

Professor Philip Harter notes that the true value of negotiated rulemaking is not merely efficiency in the process with less time to promulgate a rule, nor is it less litigation, but the ability of participants to directly immerse themselves in the actual substance of the rule connecting them to the end result. Professor Harter stated in his recommendations to the Administrative Conference of the United States that:

Negotiating has many advantages over the adversarial process. The parties participate directly and immediately in the decision. They share in its development and concur with it, rather than "participate" by submitting information that the decisionmaker considers in reaching the decision. Frequently, those who participate in the negotiation are closer to the ultimate decisionmaking authority of the interest they represent than traditional intermediaries that represent the interest in an adversarial proceeding. Thus, participants in negotiations can make substantive decisions, rather than acting as experts in the decisionmaking process. In addition, negotiation can be a less expensive means of

²³⁷ Nolon, *supra* note 221, at 358.

²³⁸ *See id.* at 359.

²³⁹ *Id.* ("The nature of this negotiation is drastically different than the nature of the formal rule making process because the parties have an opportunity to talk to each other instead of directing all comments through the agency. They can share information about what is important to them and what is not. They are free to collectively explore and evaluate different regulatory possibilities. If all the parties can reach agreement, then the text of their rule becomes the proposed rule that is then subject to the required regulatory process.").

decisionmaking because it reduces the need to engage in defensive research in anticipation of arguments made by adversaries.²⁴⁰

While this notion is contested,²⁴¹ at birth, negotiated rulemaking was designed to produce rules based on the consensus of all the affected parties.²⁴²

Advocates of the process encourage negotiated rulemaking and find that it is incredibly successful in appropriate circumstances, especially in highly-polarized conflicts.²⁴³ Factors that should be taken into consideration when an agency is contemplating the need for a negotiated rule include “the opportunity for trade-offs among parties, the level of conflict, and the importance of gathering information from affected parties, among others.”²⁴⁴

In 1990, the federal government realized the potential for negotiated rulemaking and enacted the Negotiated Rulemaking Act.²⁴⁵ The purpose of the Act is to “establish a framework for the conduct of negotiated rulemaking . . . [and] to encourage agencies to use the

²⁴⁰ Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 53 (2000) (citing Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982)).

²⁴¹ Professor Harter’s 2000 article was a response to Professor Cary Coglianese’s critical examination of negotiated rulemaking process. Professor Cary Coglianese evaluated the process keeping its two principal goals in mind: (1) to reduce the time it takes for an agency to promulgate a rule, and (2) to lessen the amount of judicial challenges that result. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rule Making*, 46 DUKE L.J. 1255, 1259 (1997). Professor Coglianese found that while the promise of negotiated rulemaking is attractive, the process is not living up to its promise of a quicker administrative process with fewer judicial challenges. *Id.* at 1334. In response Professor Harter states that

Coglianese’s research is significantly flawed and therefore misleading concerning the actual experience with negotiated rulemaking. Using as illustrations several negotiated rules cited by Coglianese in his research, [my] Article argues that Coglianese misapplies his own methodology, incorrectly measures the duration of several negotiations, and fails to differentiate among different types of judicial challenges to negotiated rules.

Harter, *supra* note 240, at 32.

²⁴² Harter, *supra* note 240, at 52. (“Coglianese argues throughout his article that the advocates of negotiated rules believed that the primary benefits of reg-neg are the reduction in both the time to reach a final rule and the incidence of litigation. While both benefits have been realized, neither was perceived by those who established the process as the predominant factor motivating its use.

²⁴³ *Id.* at 38.

²⁴⁴ Nolon, *supra* note 221, at 360.

²⁴⁵ 5 U.S.C. §§ 561–570 (2012).

process when it enhances the informal rulemaking process.”²⁴⁶ The first step is to determine whether negotiated rulemaking is the appropriate process for the proposed rule by examining several factors.²⁴⁷ Relevant factors include whether there is an actual need for the rule, the number of identifiable interests involved, whether a negotiated rulemaking committee could properly represent all affected parties, whether a consensus is probable, whether an unreasonable delay in promulgation will occur as a result of negotiations, whether proper agency resources are available, and whether, to the extent legally possible, the agency will use the consensus as the proposed rule.²⁴⁸

Once an agency has decided to trigger the negotiated rulemaking process, all stakeholders are placed on notice through the Federal Register.²⁴⁹ The public notice shall include a description of the scope and subject of the rule, a list of interests that may be impacted, a list of proposed people selected to represent those interests, and a description of how other interested parties can apply to the negotiated

²⁴⁶ *Id.* § 561. Furthermore, it is noted in the act that the law should not limit innovation and experimentation with negotiated rulemaking or any other creative rulemaking process that may be authorized by law. *Id.*

²⁴⁷ See 5 U.S.C. § 563(a)(1)–(7) (2012).

²⁴⁸ *Id.* Past negotiated rulemaking examples include the Federal Aviation and the National Park Service using the process to promulgate regulations concerning the ability of planes to travel over national parks for sightseeing purposes. Harter, *supra* note 241, at 37. The Department of Transportation entered into negotiations for the promulgation of rules relating to the delivery of compressed gases, after previous attempts were slowed by litigation. *Id.* The Occupational Safety and Health Administration applied the process when writing rules for erected steel structures, a proposed rule that had been delayed for decades. *Id.* at 37–38. Finally, the U.S. Forest Service promulgation of policies to address the placement of rock climbing fixtures in wilderness areas sought the help of a negotiated process. *Id.*

²⁴⁹ 5 U.S.C. § 564(a) (2012). For persons who believe that they are significantly impacted by the proposed rule and feel as though their interests are not represented in the committee, they may apply for a position on the committee or appoint a participant to represent their interests. When a party makes such an application it must include:

(1) the name of the applicant or nominee and a description of the interests such person shall represent; (2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent; (3) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and (4) the reasons that the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination.

Id. § 564(b).

rulemaking committee.²⁵⁰ Under the federal scheme, membership of the committee is limited to twenty-five members unless the agency decides more members are necessary to ensure the presence of all stakeholders.²⁵¹ If the committee reaches a consensus, then a report containing the proposed rule shall be delivered to the agency that established the committee.²⁵²

Aside from federal legislation, several states have enacted similar laws seeking to promote the use of this innovative rulemaking process. Texas,²⁵³ Nebraska,²⁵⁴ Florida,²⁵⁵ and Montana²⁵⁶ have enacted negotiated rulemaking laws seeking to construct a framework for the process statewide. The promotion of negotiated rulemaking on

²⁵⁰ *Id.*

²⁵¹ *Id.* § 565(b).

²⁵² *Id.* § 566(f).

²⁵³ TEX. GOV'T CODE ANN. § 2008.001-.058 (West 2011).

²⁵⁴ NEB. REV. STAT. § 84.921-.932 (2012).

The purpose of the Negotiated Rulemaking Act is to establish a framework for the conduct of negotiated rulemaking consistent with the Administrative Procedure Act. It is the intent of the Legislature that state agencies, whenever appropriate, use the negotiated rulemaking process to resolve controversial issues prior to the commencement of the formal rulemaking process of the Administrative Procedure Act. Negotiated rulemaking is not a substitute for the requirements of the Administrative Procedure Act but may be used as a supplemental procedure to permit the direct participation of affected interests in the development of new rules or the amendment or repeal of existing rules. A consensus agreement on a proposed rule reached by a negotiated rulemaking committee may be modified by an agency as a result of the subsequent formal rulemaking process. This section shall not be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process.

Id. § 84.922.

²⁵⁵ FLA. STAT. § 120.54 (2013).

²⁵⁶ MONT. CODE ANN. § 2-5-101–2-5-110 (2013).

The purpose of this part is to establish a framework for the conduct of negotiated rulemaking consistent with the Montana Administrative Procedure Act and the constitutional right of Montanans to participate in the operation of governmental agencies and to encourage agencies to use negotiated rulemaking when it enhances the rulemaking process. As authorized by 2-4-304, it is the intent of the legislature that state agencies, whenever appropriate, use the negotiated rulemaking process to resolve controversial issues prior to the commencement of the formal rulemaking process. However, negotiated rulemaking is not a substitute for the public notification and participation requirements of the Montana Administrative Procedure Act, and a consensus agreement by a negotiated rulemaking committee may be modified by an agency as a result of the subsequent rulemaking process. This part may not be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process.

Id. § 2-5-102.

the state level increases the opportunities for the process to be utilized on a more local level. Often times, land use decisions and conflicts occur on the local level and involve several regional and community stakeholders. Therefore, negotiated rulemaking at the lower levels of government provides considerable opportunities to positively affect regional land use schemes and their corresponding regulations.

Interestingly, in 1998, the Superintendent of the Fire Island National Seashore and the NPS sought a collaborative method of enacting new regulations to govern motor vehicle use on the island.²⁵⁷ The purpose for applying a collaborative method of rulemaking was in response to citizen concerns about the current regulations and the need for the NPS to build a consensus based on all stakeholder opinions.²⁵⁸ The Consensus Building Institute was contracted to provide a Conflict Assessment and proposed the creation of the Negotiated Rulemaking Advisory Committee for Off-Road Driving Regulations at Fire Island National Seashore.²⁵⁹

The purpose of the Conflict Assessment is to “evaluate whether a consensus-based negotiation could be convened and if it is likely to be successful in resolving issues about the FINS driving permit system.”²⁶⁰ The report notes that in making their determination, they considered four questions: (1) whether the key stakeholders were identifiable, (2) whether the key stakeholders had overlapping interests, (3) whether the key stakeholders were willing to work together, and (4) whether a capacity to negotiate existed.²⁶¹ After a comprehensive analysis of the stakeholders and the substantive issues, the Conflict Assessment concluded that the NPS should proceed with a negotiated rulemaking process and identified the major stakeholders.²⁶²

²⁵⁷ KOPPELMAN & FORMAN, *supra* note 76, at 143.

²⁵⁸ *Id.*

²⁵⁹ *Id.*; CONSENSUS BLDG. INST., CONFLICT ASSESSMENT: THE PROSPECTS FOR BUILDING CONSENSUS ON FIRE ISLAND NATIONAL SEASHORE’S VEHICLE USE REGULATIONS (1999), available at http://www.nps.gov/fiis/parkmgmt/upload/RegNeg_Prospectus_Sept-1999.pdf.

²⁶⁰ *Id.* at 2.

²⁶¹ *Id.*

²⁶² *Id.* at 24. The negotiated rule making process started in 2002 and involved a twenty-four person committee appointed by the Secretary of the Interior. A Final Consensus Agreement was entered into on August 22, 2003, and addresses many of the regulatory concerns including: number of permits, primary transportation, allowances for time and areas for driving, police driving, and management of driving. *Off-Road Driving*

The collaborative rulemaking process was a success and resulted in the promulgation of consensus-based regulations.²⁶³ This example proves that varying stakeholders, including local government representatives and community members, can collaborate on an issue to make an informed, transparent, and consensus-based decision regarding the future land use practices on the seashore. While the federal government initiated the negotiated rulemaking process under these facts, any governing entity that is seeking to amend or promulgate regulations should consider the negotiated rulemaking process.

For example, local governments seeking to alter their local land use laws, such as the Town of Brookhaven, would benefit from this open process. They would be able to garner support and build a consensus for their proposals. If the Town of Brookhaven had negotiated its nonconforming use amendment, the local government may have been able to work with the NPS to enact a local law that serves local interests and regional goals. The NPS has stated that they are a stakeholder in the local process:

As consulting party, NPS does not control or coordinate the process, but rather participates in it as an affected stakeholder. We have consulted with park staff and have learned that they have been carefully monitoring this activity and are aware of this new zoning code amendment, which has just been adopted only two weeks ago.²⁶⁴

As a major stakeholder, admittedly, the NPS should not be limited in its capacity to partake in local land use decisions, such as a code change. This is especially true when the change will have an adverse impact on the seashore and is in violation of federal regulations. The negotiated rulemaking process allows the Town and the NPS to have this discussion prior to drafting any law or regulation. A discussion that will take place outside of the traditional participation methods proved ineffective in this case.

Regulations, NAT'L PARK SERVICE, <http://www.nps.gov/fiis/parkmgmt/off-road-driving-regulations.htm> (last updated Nov. 5, 2013).

²⁶³ KOPPELMAN & FORMAN, *supra* note 76, at 143.

²⁶⁴ Letter from Michael Caldwell, Deputy Reg'l Dir., Nat'l Park Serv., to Thomas Brown and Marguerite Switzgale (Feb. 22, 2013) (on file with author).

**CONCLUSION: A COLLABORATIVE AND REGIONAL SOLUTION TO
CONSERVING THE NATION'S NATURAL RESOURCES**

This Article touched upon local and regional land use concepts, governance theories, and the principles of collaborative decision making. When taken out of the abstract and examined through practical cases, a set of best practices for the regulation of parklands encumbered by local governments and private property is realized. In these unique circumstances, a strong regional authority is necessary to mitigate the negative externalities that local land use decisions may create. However, local autonomy cannot be completely bypassed when formulating a regional structure. Local processes must be preserved to ensure that the benefits of localism—efficient provision of services, increased democratic processes, and a strong sense of community—are included in the regional scheme. To meet these ends, it is essential for any regional land use scheme to incorporate the notions of cooperative federalism and collaborative decision making.

This Article suggests that the NPS seems distant from the local process and unaware of the land use practices local governments are supporting. Additionally, local governments are seeking to gain control back from the regional authority through illegitimate means. For the “Sword-of-Damocles” land use system to achieve successful conservation, a more collaborative process must be instilled where all parties, including the NPS, take an active role in land use planning and enforcement. A more collaborative method will increase transparency and better educate the community about the Fire Island National Seashore. Collaborative mechanisms will give local governments a legitimate avenue to control land uses within the region. Regional schemes, such as the “Sword-of-Damocles,” will not work with local governments regulating individually in conflict with the regional authority.

Switching gears to the Adirondack Park, the APA has implemented a slightly different and more collaborative approach while maintaining strong enforcement powers. The APA is highly involved in the promulgation and enforcement of land use practices at the local level. This Article suggests that integrating a truly collaborative regional land use scheme is a solution to the anxieties and tensions between governing entities and stakeholders. A recent development project, the Adirondack Club and Resort, has evidenced feelings of anger on behalf of stakeholders who are calling for a more transparent

process. The approval process for the Adirondack Club and Resort lasted a decade due to stakeholder concerns and is still being litigated. Costly litigation and transparency concerns can be avoided if collaborative decision-making processes are set in place.

This new regional approach, born from the notions of “New Regionalism,” shall consist of a strong regional authority coupled with the aforementioned collaborative methods. This represents best practices for the conservation of parklands that struggle with advancing regional goals while maintaining the advantages of the local process. As a result, local governments will feel vested in the regional efforts, and the regional authority will be able to promote and further regional conservation goals. An understanding of the stakeholders and the regional land use process must be reached. This model of best practices has the ability to improve communications and educate all stakeholders involved, a process that is lacking in most circumstances.